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In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 726

SAM GIANCANA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–11a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on October 8, 1965. The petition for a writ of certiorari was filed on November 5, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the grand jury proceedings were, in the words of the immunity provision of the Federal Communication Act, "based upon or growing out of any

alleged violation of this Act," so that the district court was empowered to grant immunity to petitioner and compel his testimony.

2. Whether petitioner could refuse to testify on the ground that the questions were not relevant to the inquiry.

STATUTE INVOLVED

Section 409 of the Communications Act of 1934, 48 Stat. 1096, as amended, 66 Stat. 721, 47 U.S.C. 409, provides in pertinent part:

> (l) No person shall be excused from attending and testifying or from producing books, papers, schedules of charges, contracts, agreements, and documents before the Commission, or in obedience to the subpena of the Commission, whether such subpena be signed or issued by one or more commissioners, or in any cause or proceeding, criminal or otherwise, based upon or growing out of any alleged violation of this Act, or of any amendments thereto, on the ground or for the reason that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, documentary or otherwise, except that any individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

STATEMENT

Petitioner was found in civil contempt for having refused to obey a court order of June 1, 1965 to testify before a federal grand jury after being informed that he would be immune from prosecution growing out of his crimes. He was committed to the custody of the United States Marshal until he obeyed the order. The facts leading to his commitment may be summarized as follows:

On May 14, and May 19, 1965 petitioner appeared before the grand jury under subpoena. He was advised that the grand jury was investigating possible federal violations including Federal Communication Act violations, gambling, extortion and interstate travel in aid of racketeering. After being so advised, he was excused from the grand jury room and permitted to confer with counsel. Petitioner refused to answer any questions, other than his name and address, on the ground that the answers might incriminate him. He was asked, and refused to answer, such questions as the following: whether he had calls charged to his home telephone; who used his home telephone; whether he used any other person's credit card in placing long distance calls; whether he called particular named persons; and whether certain matters, including payment for issuance of a building permit, were discussed in telephone conversations of a particular date. He was also asked whether a portion of his gambling income came from two particular establishments (Exhibits B & C).

On May 27, petitioner again appeared before the grand jury under subpoena. The foreman of the

grand jury told him that the grand jury was investigating possible violations of 47 U.S.C. 203 and 501 and that the Assistant United States Attorney was going to ask him questions in furtherance of this investigation. He was informed that he would be "immune from prosecution or subjection to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which you might testify or produce evidence before this Grand Jury." Petitioner still refused to answer any questions, again claiming the privilege against self-incrimination. He was directed to appear before the court (Exhibit D).

The United States Attorney requested an order pursuant to 47 U.S.C. 409(l) directing that petitioner not be excused from testifying and that petitioner not be subject to prosecution for any matter about which he would be compelled to testify (A. 7–11). On June 1, 1965 petitioner appeared in court and, through counsel, opposed this request on two grounds. He argued that the government should designate the question which it wished petitioner to answer and that petitioner should not be required to answer any additional questions until the court ruled "whether there is a substantial relationship between the new matter that the Grand Jury is investigating and an FCC violation" (A. 16–17). The court rejected his objections and ordered petitioner to answer the questions. It advised petitioner (A. 21):

> * * * that the immunity heretofore extended by the statement of the Foreman of the Grand Jury invoking the Statute of which you have already been advised is full and complete. It

> will protect you against any possible incrimination, State or Federal, in any possible jurisdiction. It is complete, permanent and absolute, and under such complete immunity, I now order and direct you to return and answer fully the questions already propounded to you as to which you have invoked the Fifth Amendment protection, and any other questions that the Grand Jury may, in the discretion of its Foreman, permit to have asked you.

Later that day, the court repeated, in response to a request for clarification of his order by petitioner, "that the record already made * * * encompasses and anticipates any and all questions, including those already asked [petitioner] and any others, and that the immunity which I have heretofore defined for him applies with reference to any testimony that he gives, whether it be in answer to a question heretofore asked or any other question that may subsequently be asked" (A. 25).

Petitioner returned to the grand jury. After giving his name and address, he again declined to answer any questions. He was brought before the court and found to be in contempt of its order to answer the questions. The court committed him to the custody of the United States Marshal until he answered the questions (A. 28–33).

ARGUMENT

1. The claim that the subject matter of the inquiry did not meet the statutory condition upon which the application of the immunity provision depends is the same issue which the Court declined to review in

United States v. *Testa*, 326 F. 2d 730 (C.A. 3), certiorari denied, 376 U.S. 931; *Marcus* v. *United States*, 310 F. 2d 143 (C.A. 3), certiorari denied, 372 U.S. 944; and *United States* v. *Harris*, 334 F. 2d 460 (C.A. 2), No. 6, this Term (certiorari granted on other issues, but not as to the grant of immunity). As in those cases, the grand jury in this case was conducting an investigation "based upon or growing out" of alleged violations of the Federal Communications Act. Both the grand jury foreman and the United States Attorney informed petitioner that the grand jury inquiry was conducting a broad inquiry whose scope included possible violations of Section 203 and 501 of that Act (see Statement, *supra*, pp. 3–4). The district court could properly accept these statements as to the investigative purpose of the grand jury.

Moreover, the questions asked petitioner show that the grand jury was investigating the interstate use of the telephone for unlawful purposes (see Statement, *supra*, p. 3). Under the cases cited, such action would be a violation of the Communications Act in that it would cause the telephone company to violate its tariff. It is not necessary, as petitioner contends, that he be a common carrier in order to be convicted under Sections 501 and 203 of the Federal Communication Act. This is demonstrated by *United States* v. *Andrews*, 347 F. 2d 207 (C.A. 6), petitions for writs of certiorari pending, Nos. 607, 703, 706–707, this Term, where several individual defendants were convicted under a count in the indictment which charged them with wilfully and knowingly causing the telephone company to provide serv-

ice for an unlawful purpose, *i.e.*, the transmission of wagers in violation of the tariff filed by the carrier. In other words, they violated Section 501 by wilfully and knowingly causing an act to be done in violation of Section 203, namely, the furnishing of a communication service not permitted by the tariff.[1] Nor is it significant under the cases cited above that the grand jury was investigating possible violations of other statutes as well. As long as the grand jury was investigating possible violations of the Communications Act, it was proper to invoke the immunity provisions of that Act in relation to the entire subject matter then under investigation.

2. There is no substance to petitioner's claim that if he testifies before the grand jury he will not receive

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[1] In addition to the provisions of Section 501 of the Communications Act, penalizing anyone who willfully causes or suffers an act to be done in violation of the Act, the general aider and abettor statute, 18 U.S.C. 2, may also be applied to make individuals liable as principals to violations of Section 203(c) of the Act. Section 2(b) of Title 18 U.S.C., punishes as a principal one who "willfully *causes* an act to be done which if directly performed by him or *another* would be an offense against the United States" (emphasis added). It is well established that one who causes the commission of an offense by an innocent agent or instrumentality is guilty as a principal (*United States* v. *Giles*, 300 U.S. 41; H. Rep. No. 304, 80th Cong., 1st Sess., p. A5; see Reviser's Note to 18 U.S.C. 2(b)), even though he was incapable in the first instance of committing the substantive crime (S. Rep. No. 1020, 82d Cong., 1st Sess., Sec. 17B, pp. 7–8; see *Phillips* v. *United States*, 218 F. 2d 385, 387 (C.A. 9); *Logsdon* v. *United States*, 253 F. 2d 12, 15 (C.A. 6); *Benchwick* v. *United States*, 297 F. 2d 330, 332–333 (C.A. 9); *Haggerty* v. *United States*, 5 F. 2d 224, 225 (C.A. 7); *United States* v. *Melekh*, 193 F. Supp. 586, 592 (N.D. Ill.)).

protection from prosecution unless the court rules on the relevance of each question asked. The immunity granted would not be limited to those questions which directly involve a specific violation of the Act pursuant to which immunity was granted. Once it is shown that the grand jury is investigating a violation which is subject to an immunity statute, the witness obtains immunity, State and federal, as to all questions within the range of the general subjects under investigation. This is a requirement of the Constitution (*Ullmann* v. *United States*, 350 U.S. 422; *Albertson* v. *Subversive Activities Control Board*, No. 3, this Term, decided November 15, 1965) which is fully satisfied by the plain wording of the statute. Section 409(l) of Title 47 provides that "no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence."

It is of course true that before the immunity attaches the court must find that the grand jury inquiry does, at least in part, relate to an area which falls within an immunity statute. As we have shown, that relationship was established in this case. However, once it is found that the grand jury is conducting an inquiry into a field where immunity pertains, then the witness obtains full immunity as to everything arising out of that inquiry, including acts which might constitute a violation of some other statute. It may be that, if a grand jury enters a field totally unrelated to the

general *subject matter* of the inquiry under which immunity is granted, an issue might arise as to the duty to testify. That is the "substantial relationship" to which the Second Circuit referred in *Harris*. This does not mean, and no court has held, that every question must relate to the particular violation under which immunity is granted.[2]

It appears from the opinion of the court of appeals that on argument petitioner's counsel contended that some questions put to petitioner on May 14 and May 19 were irrelevant (Pet. App. 5a–6a). The court of appeals found it unnecessary to pass upon that claim since those questions were not put to petitioner on June 1, after the grant of immunity.[3] It went on to hold the questions in any event relevant and to note that petitioner was refusing to answer all questions, not merely those he considered irrelevant. Since petitioner argues here only the general proposition that each question must relate directly to a Communications Act violation—a contention which is untenable under the authorities—we think no issue as to any particular question is before the Court.

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[2] Under the statute involved in *In re Bart*, 304 F. 2d 631 (C.A.D.C.), 18 U.S.C. 3486, the court is specifically required to make a finding that the offense under investigation involved "interference with or endangering of * * * the national security or defense."

[3] After petitioner appeared before the grand jury on June 1, the United States Attorney told the court what had occurred before the grand jury. Petitioner's attorney agreed that it was not necessary to call the reporter to testify *in haec verba* (A. 28–29). In these circumstances, petitioner was in no way prejudiced when the court of appeals was furnished with the transcript of his grand jury testimony on June 1.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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